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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 590.

CHESAPEAKE & OHIO RAILWAY COMPANY, ... Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... Respondent.

Petitioner's Reply to Respondent's Brief on Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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January 8, 1962.

WESTERFIELD-GOWDY CO., INCORPORATED, LOUISVILLE, KY.

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REPLY TO RESPONDENT'S BRIEF.

FIRST POINT.

Regardless of what the parties and the District Court *called* the correspondence of 1948-1949, the *substance* of the correspondence was to change the contract and to make it a new contract.

This correspondence arose out of a claim against both the L&N and the C&O which a little girl named Leonhardt asserted. While a pedestrian, she was caught in a crossing gate when it was raised following passage of a C&O train.

No negligence of either company caused injury to the child. She was hurt because of an inherent defect of design in the crossing gate itself. The gate was joint property of the L&N and C&O.

The original contract is utterly silent on what should happen in case a vice or defect in *joint property* should cause an injury to a third party.

Since it was obvious from the experience which the parties were having from claims asserted at crossings, other than resulting from collisions with trains, that the omission from the contract of any provision to cover a case like the child's case was a serious flaw in the contract, the parties by the correspondence cured the defect. The agreement made by the correspondence (36a-37a) brings into the contract a provision that (to paraphrase the language of the first paragraph of Article Fourth):

> "In respect to the liability of the parties using said line to third persons growing out of a vice or defect inherent in the property jointly used, such defective property shall be deemed and held to be sole property of the party to or upon or in connection with whose train loss or damage may have occurred."

Thus, because of this change by way of an expansion of the contract, the C&O accepted sole liability in the given accident and in similar accidents involving joint property which were not covered and included in the language of the contract as originally written (36a-37a).

The trial court found that the correspondence was contemporaneous construction only and, therefore, not a modification of the contract such as results in a new agreement (41a). The trial court was in error in

applying the doctrine of contemporaneous construction because that doctrine "is applicable only in case of ambiguity in the language sought to be construed." *Murphy* v. *Boling*, 273 Ky. 827, 834, 117 S. W. 2d 962, 966 (1938). The 1895 agreement was not ambiguous about which of the parties should stand the loss sustained by the little girl's being caught in the crossing gate. It simply did not deal at all with a situation of that kind. Regardless of the fact that the parties used the word interpretation in their correspondence, neither that fact nor the fact that the trial court *called* the correspondence a contemporaneous construction can change its substance. The substance of the correspondence is that, if a defective piece of joint property at a crossing causes an accident to a third party in connection with the operation of a train, the party operating the train will answer for the damages. Nothing in the contract so provides; only the correspondence so provides.

The law is elementary that a new contract results when a modification is made of an existing contract to bring into it new areas of understanding which the original contract did not include.

> "* * * by the rules of the common law, it is competent for the parties to a simple contract in writing, before any breach of its provisions, altogether to waive, dissolve, or abandon it, or to add terms, and *thus make it a new one* * * *." 12 Am. Jur., Contracts, Section 428, Page 1006 (emphasis added).

Since the contract now in suit includes the 1948-1949 corespondence, and since the substance of that correspondence is an addition to the contract, it is a new contract as of 1949, and Section 14 of the Federal Arbitration Act does not exclude it from the Act's coverage.

SECOND POINT.

The C&O did not waive its right to arbitration by appointing Mr. Vawter as an arbitrator.

"To constitute a 'waiver' there must be an intentional relinquishment of a right with both knowledge of its existence and intention to relinquish." *McElwee-Kourbis Construction Co.* v. *Rife,* 133 F. Supp. 790, 795 (M.D. Pa. 1955).

By this definition, the C&O's designation of Mr. Vawter as its arbitrator cannot amount to a waiver. On the contrary, the C&O has sought both before and after the L&N filed suit to preserve its contractual right to arbitration. It certainly has not intended by any act to relinquish its right to arbitrate.

As evidence of its perfect good faith, it revoked its designation of Mr. Vawter and offered to designate a non-officer or non-employee as its arbitrator, if plaintiff would do the same (40a-41a). *Continental Insurance Company* v. *Vallandingham & Gentry,* 116 Ky. 287, 76 S. W. 22 (1903), L&N's brief pages 17, 19, is distinguishable from this case because there the insurer had not merely appointed an appraiser, but the appraiser had returned an extremely low and biased

appraisal, the insurer had stood on the appraisal, the insured had sued, and, only after those developments, the court excused the insured from any obligation to arbitrate because of the insurer's lack of good faith.

In *American Guaranty Co.* v. *Caldwell*, 72 F. 2d 209 (CCA 9, 1934), L&N's brief page 17, a partisan arbitrator had entered upon his duties and had returned a biased award. In *American Locomotive Company* v. *Gyro Process Co.*, 185 F. 2d 316 (CA 6, 1950), L&N's brief, page 17, the American Locomotive Company proceeded with litigation for a number of years before it first raised the issue of arbitration and had by its long course of conduct prejudiced the Gyro Company.

In *Hartford Fire Insurance Company, et al.* v. *Asher*, 30 K. L. R. 1053, 100 S. W. 233 (1907), L&N's brief, page 19, there is a precedent for the C&O's offer to designate a different arbitrator. In that case, each party had nominated a partisan appraiser, and the appraisal proceedings utterly broke down. The court suggested the following remedy (30 K. L. R. at 1054, 100 S. W. at 234):

> "* * * When the appraisers broke up * * * it was incumbent upon the insurance Company promptly within a reasonable time to name another appraiser not a partisan, and to request Asher to do the same * * *."

No authority sustains the L&N's contention that the *mere nomination* of Mr. Vawter amounted to a waiver of the C&O's right to arbitration. The C&O does not

intend to waive its right, has always insisted upon that right, and has tried to demonstrate the highest good faith in voluntarily revoking the designation of Mr. Vawter and offering to designate a non-officer or non-employee to arbitrate this matter.

THIRD POINT.

The L&N is not entitled to rely upon the jury's finding that the C&O's negligence proximately caused the accident because, among other errors in the instructions, the court improperly instructed the jury on last clear chance, and the C&O adequately preserved its objection to this erroneous instruction.

The record shows that it is true (contrary to Respondent's contention at page 13 of its brief) that the District Court gave an instruction on last clear chance over the C&O's objections.

The record speaks for itself:

> "Foreman of the Jury: Your Honor, could you define the word 'proximate' that you are using here?
>
> "By the Court: All right. I mentioned before that a person may be negligent, but if their negligence is not the proximate cause of the accident they are not chargeable with any damages that might have been sustained.
>
> "An example would be that if I was driving my car on the wrong side of the street, and a person shouldn't do that in the exercise of ordinary care, and somebody would come along at an excessive rate of speed and strike me when I'm on the wrong

side of the street, if the person that struck me, by the exercise of ordinary care could have seen me and could have stopped before he hit me, my negligence would be excused to the extent that I would not be liable and would not be charged with negligence because I was on the wrong side of the road (119a)."

* * * * * * *

"Mr. Fulton: Judge, may we approach the bench, before the jury leaves?

"By the Court: Yes.

"(The Following Proceedings Occurred at the Bench Out of the Hearing of the Jury.)

"Mr. Fulton: I don't know anything about your case, but did you all talk to the jury about contributing cause? Was that explained?

"Mr. Kirven: That was not explained. In this case, there's one thing in here, I think the Court's first example was an indication of the last clear chance.

"By the Court: I think it was.

"Mr. Kirven: Of course we don't have the last clear chance here.

"By the Court: But at the same time, isn't it also a question that last clear chance doctrine clearly to a layman when one person is negligent and yet their negligence does not contribute to the accident—

"Mr. Kirven (Interrupting): Could we agree on another example, maybe, and give that?

"By the Court: What is the other example? I started to use a train, whether they could stop it in time, but I thought better.

"Mr. Kirven: Yes. Something—well, a child coming out in front of a car, if it suddenly appears and you are going 50 miles an hour and you should have been going 30 or 20, it's still, the speed is not proximate cause.

"By the Court: Well, in a child you may or may not have contributory negligence.

"Mr. Kirven: Yes.

"By the Court: I don't think that other than a legal mind would take exception to the last clear chance example, and here's one person that's negligent and the other—

"Mr. Kirven (Interrupting): Of course, being on the wrong side is such a flagrant negligence it's hard for the jury to say that that guy ought not—he shouldn't have been on the wrong side of the road (120a-121a)."

The C&O could do no more than it did in expressing its objection to the court's giving a last clear chance example. It objected to the example (120a). It offered another example, not involving last clear chance (121a), which the court declined to give. It then renewed its objection to the driver on the wrong side of the road and the last clear chance example (121a).

The jury then retired and deliberated for an hour and twenty minutes (122a).

The *next day* the proceedings recited in respondent's brief, pages 14-15, took place (123a). If the C&O acquiesced in the instruction given at that time, which related to proximate cause (123a), it certainly did not acquiesce in what had been done the previous day, which related to last clear chance. It having made

its objection to the last clear chance example, offered an alternate example, and renewed its objection when the alternate example was not given, it was not required to persist in the same old point the next day when the court was instructing on a different point.

The destinctions which the L&N would draw between this case and those cases upon which petitioner relies in support of its application for the writ are based entirely upon the assumption that the jury's verdict was proper. But the verdict is not proper because it is based on erroneous instructions as indicated in this brief and in the brief accompanying the petition.

CONCLUSION.

The C&O did not waive its right to arbitration. The correspondence of 1948-1949 made a substantive change in the contract and thus made it a new one so that the Federal Arbitration Act is applicable to it. The jury's verdict should not have been allowed to stand because it was based on erroneous instructions.

The court should grant the petition for a writ of certiorari.

Respectfully submitted.

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